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Negotiating Authority: Ulama and Family Law Reforms in Pakistan

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Abstract

The institution of family is regarded as a significant unit of society in Islam, so family laws are pivotal in the legal system of Pakistan. Pakistan has adopted Anglo- Muhammadan Law post-independence which is a combination of Islamic principles and colonial interpretations of the British. Since then, the State of Pakistan is attempting to reconcile Islamic tradition with modern legal needs through reforms and judicial activism through *ijtihād* (also termed as judicial *ijtihad*). The current study examines the evolution of Islamic family laws in Pakistan from their classical juristic foundation to contemporary initiatives in legal reform. Pakistani laws are primarily rooted in Islamic *fiqh* reflecting a complex interaction between Sharī'ah, colonial legal legacies, constitutional mandates and modern socio-political demands. With an emphasis on how tradition and reform have coexisted, clashed, and changed the legal status of women in areas like marriage, divorce, and maintenance– this paper examines the historical development, legal underpinnings, and socio-religious discussions surrounding Muslim family laws in Pakistan. By tracing the transition from traditional norms to reform-oriented legal mechanism, this paper attempts to seek answers to questions like why reforms in family laws of Pakistan are needed. Whether the family laws of Islam are secular and anti-Islamic? And whether the reluctance and resistance to accept laws in reform is of religious nature or a threat to patriarchal and authoritative behavior? Consequently, the paper argues that the reforms in Pakistan's family laws are not departure from Islam, but a contextual reinterpretation aimed at addressing contemporary social realities.

Keywords: Pakistan Family Laws, *Talāq*, *Khula,* polygamy, modern reforms, Islamic jurisprudence (*fiqh*), women rights, judicial *ijtihad*

Introduction to the Development of Family Laws in Islam

The interaction of colonial legal legacies and religious traditions has influenced the evolution of Muslim family law in Pakistan. Pakistan, a Muslim-majority post-colonial state, inherited a legal

system that aimed to balance contemporary statute reforms with traditional Islamic law. A recurring conflict between traditional interpretations, particularly those of the Ḥanafī School, and progressive legal reforms that seek to increase women's rights and adjust to shifting societal demands is at the core of this legal discourse.

The debate over the use of terminology of "family law" in Pakistan emerged on two primary grounds- the broader purpose of the Islamization of the legal system,[1] and the simultaneous safety and advocacy for women's rights, championed most prominently by the All Pakistan Women's Association (APWA).[2] While religious scholars (*Ulama*) and political leaders worked to align family laws with public sentiments and Islamic principles;[3] women-right activists aimed to ensure that reforms also protected and empowered women.[4] This dual struggle unfolded within a constitutional framework as Pakistan pursued to define its identity as an Islamic nation.[5]

A major step in this movement was the adoption of the Objectives Resolution by the first Constituent Assembly in March 1949, establishing the sovereignty of Allah and emphasizing the need for governance and social life to align with Islamic teachings.[6] Further development came from a 1951 conference led by Maulana Syed Sulaiman Nadvi (1884-1953) in Karachi, where 22 constitutional points were agreed upon as the foundation for an Islamic constitution. Later, in 1955, a commission was appointed by the government of Pakistan to survey the existing family laws, particularly the ones pertaining to marriage, divorce and other ancillary matters for Muslims. This commission comprised of six members, including Khalifa Abdul Hakim (d. 1955), Maulana Ehteshamul Haq (1893-1959), Enayat-ur-Rahman (1915-80), Begum Shah Nawaz, Begum Shamsunnahar Mahmood and Begum Anwar G. Ahmad (1896-1979).[7]

These processes culminated in the 1956 Constitution, which formally declared Pakistan an Islamic Republic; and mandated that no laws could contradict the Qur'ān and Sunnah, with an expectation to reform existing laws accordingly.

1.1. Research Questions

The current study aims to study following questions:

A. Why reforms in family laws of Pakistan are needed?

B. Whether the family laws of Islam are secular and anti-Islamic?

C. Whether the reluctance and resistance to accept laws in reform is of religious nature or a threat to patriarchal and authoritative behavior?

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[1]Mudarsa Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan: An Analysis," *Islamic Studies* 59, no. 2 (2020): 203.

[2]"All Pakistan Women's Association 1948, https://www.apwanational.com/ (accessed January 11, 2025).

[3]Mujeeb Ahmad, "Ulamā' and the Muslim Family Laws in Pakistan," *Islamic Studies* 59, no. 1 (2020): 51-53.

[4]Mumtaz Ahmad, "The Muslim Family Law Ordinance of Pakistan," *International Journal on World Peace* 10, no. 3 (1993): 44.

[5]Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 203.

[6]Tanzeel-ul-Rehman. *Majmū'a Qawānīn-i-Islām* [Collection of Laws], Vol. 1. (Islamabad: Idara Tahqiqat-e-Islam, 1976); "Constituent Assembly of Pakistan 1949," (Karachi, 1949), 65-102 presented by Liaqat Ali Khan (1891-1951).

[7]Abu Ammar Zahid Al-Rushdi, *Pakistan Mein Nifaz-e-Shariat Ki Mutafiqah Dastavezat* [Agreed Documents on the Implementation of Sharia in Pakistan Urdu]. Karachi: *Mahnamah Awan-e-Islam* (Monthly Awan-e-Islam), 2001.

2. From Traditional to Contemporary Family Laws in Pakistan: A Brief Summary

2.1. Man as Financial Provider

One of the chief traditionalist arguments is that the secularization of Pakistan's Muslim family laws is to uphold female equality, which is the fundamental focus of the modernist *Ulama*.[8] In view of the *Sharī'ah* and the Qur'ānic teachings, the traditional *Ulama* does not absolve the husband of the duty that the Sharī'ah has placed on him in order to preserve his superior position in the marriage.[9] "And due to the wives is similar to what is expected of them, according to what is reasonable. But the men have a degree over them [in responsibility and authority]. And Allah is Exalted in Might and Wise."[10]

While this verse clearly highlights that men have been granted a degree over women, the reason why that is so has been explained in *Surah al-Nisa*: "Men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth."[11] The given verse supports the conventional stance of men to be the financial provider in a marriage, while the contrasting ideas mostly stem from western culture with no evidence coming from Islamic Sharī'ah, under any school of thought. This selective and orthodox argument is superficial and can be refuted in the third and fourth section of the study.

2.2. Classical and Modern Reforms in Family Laws

Before an in depth discussion, we need to understand the historical junctures through which family laws in Pakistan were formed. The following figure illustrates the transition of Islamic Family laws from classical to modern reforms.

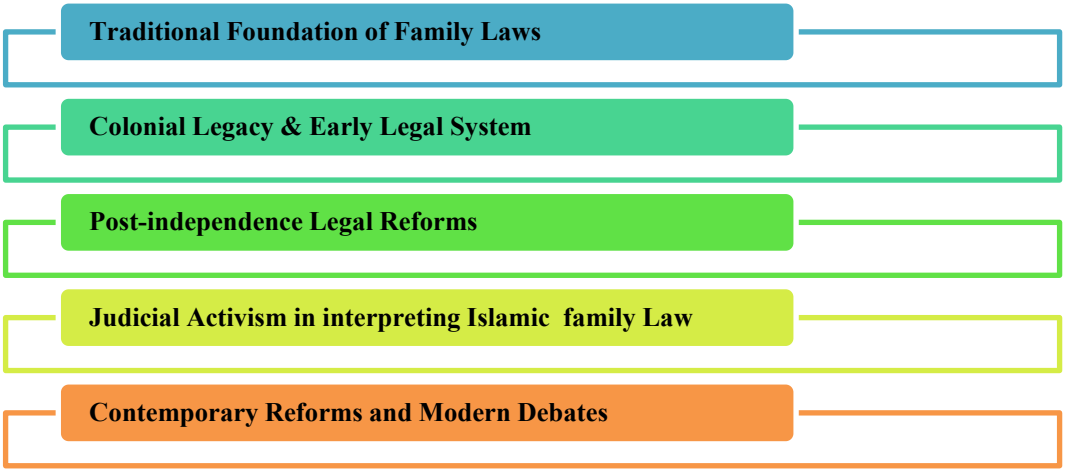
Traditional Foundation of Family Laws
Colonial Legacy & Early Legal System
Post-independence Legal Reforms
Judicial Activism in interpreting Islamic family Law
Contemporary Reforms and Modern Debates

Figure 1. A Transition from Traditional to Contemporary Family Laws in Pakistan

[8]Ahmad, "The Muslim Family Law Ordinance of Pakistan," 37.
[9]Ahmad, "Ulamā' and the Muslim Family Laws in Pakistan."
[10]Al-Qur'ān: Al-Baqarah 2:228.
[11]An-Nisa 4:34.

The sources for traditional family laws lie in Qur'ān, *Sunnah* (prophet's teachings), *ijma* (consensus of opinion among Muslim scholars), *ijtihād* (independent reasoning by Muslim scholars) and *Qiyas* (analogy).[12] While Hanafi School was dominant in South Asia, contemporary reforms utilize all four fiqh of Sunni (Hanbali, Hanafi, Maliki, Shāfī) for better understanding of modern-day challenges and issues.[13] Furthermore, the other schools of thoughts in Shi'a sects (Jaaf'ri, Ismaili, Zaydi) are also to be considered.[14] The core principles enumerate marriage (*nikāh*) as a civil contract where rights and obligations of spouses all distinctly defined; *Talāq* (unilateral divorce) is given by men; polygamy is allowed with conditions; and guardianship and inheritance rules are also included.

Early legal structure used codification of Muslim personal law during colonial rule where juristic authority was replaced by judicial interpretation.[15] Since there is an evident gap in Qur'ānic teachings for family laws, therefore judiciary used their own discretion as per evolving times.[16] The institution of Federal *Shari'at* Court (FSC) has contributed significantly in Islamization of colonial laws using *ijtihad*.[17] As a result, Muslim Family Law Ordinance (MFLO-1961) regulated polygamy through arbitration councils; registration of marriage and divorce became mandatory; arbitrary *Talāq* was restricted; and inheritance right for grandchildren has been improved.[18] In addition to MFLO, Family Courts Act (1964) simplified procedures for family disputes; and enhanced easier access to justice (specifically for women).[19]

Due to extreme usurpation and misrepresentation of women rights in Islam, judicial *ijtihad* and reinterpretation of classical doctrines was direly needed. Balancing Islamic principles with constitutional rights became imperative. The chief cases include: judicial divorce (*khula*), child custody and maintenance; and the validity of triple *Talāq*. As of current, protection of women and gender rights are being highlighted. While there is a visible influence of international human rights, there is a prominent resistance from rigid mentality religious lobbies who believed that judicial activists are using their discretion to modify family laws.[20] Hence the constraint and conflict between Islamization and modernization;[21] and ongoing debates for uniform interpretation of Sharīʿah are contemporary judicial challenges in Pakistan.

3. The Right of Divorce

Divorce means the termination or dissolution of marriage (*Nikāh*) between the spouses (*zaujayn*). A married couple may choose to do it personally or they can get the dissolution of marital relation

[12]Muhammad Zaman, "Exchange Marriage System and Muslim Family Laws in Pakistan," *Pakistan Journal of History and Culture* XXXIII, no. I (2012): 5.

[13]"According to the section 2 of the Shariat Application Act 1991, it is not necessary to follow a specific school of Islamic law while interpreting the Qur'ān and *sunnah*. Rather opinions from different schools can be preferred for this purpose." Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 212.

[14]Zubair Abbasi, and Shehbaz Ahmad Cheema, "Historical Context of Muslim Family Law in Pakistan," In *Family Laws in Pakistan*, by Zubair Abbasi and Shehbaz Ahmad Cheema, (Oxford University Press, 2024), 9-22.

[15]Abbasi and Cheema, "Historical Context of Muslim Family Law in Pakistan," 10.

[16]Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 207.

[17]Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 207.

[18]"Muslim Family Law Ordinance, 1961," *The Pakistan Code: Ministry of Law and Justice,* (1961), https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-apaUY2Npa5po-sg-j (accessed February 3, 2025).

[19]"The Family Courts Act, 1964," *The Pakistan Code: Ministry of Law and Justice,* (1964), https://pakistancode.gov.pk/english/ (accessed February 02, 2025).

[20]Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 204.

[21]Ahmad, "The Muslim Family Law Ordinance of Pakistan," 37.

through an agent or a lawyer or a delegate, with the use of certain words or (could be done) allegorically, immediately or subsequently.[22] The Dissolution of Muslim Marriages Act (DMMA-1939), was a landmark legal reform in region of subcontinent.[23] This was drawn from the Mālikī School of Islamic jurisprudence, although the conventionally followed school of thought was Hanafi one. In the light of this act, Muslim women got two basic yet major rights: first, broader grounds for divorce such as cruelty of conduct (domestic abuse, having extra marital affair, commits adultery, force her to lead immoral life, treat her inequitably in case of having more than 1 wife);[24] illness or insanity (for a period of 2 years), impotence, absence (for a period of 4 years); non-maintenance (for past 2 years); if a husband is imprisoned (for seven years or more) which are prominently the grounds that were not recognized under Ḥanafī law.[25] Hanafi Law, on the other hand, allowed dissolution only in cases of the husband's impotency.[26] Second, it restricted the practice of apostasy among Muslim women by legally enabling them to seek divorce without leaving Islam, thus offering a religiously valid and humane path to end oppressive marriages.[27]

The Islamic law of divorce has been described in detail in the Holy Scripture.[28] As Qur'ān states:

> Divorce is twice. Then, either keep [her] in an acceptable manner or release [her] with good treatment. And it is not lawful for you to take anything of what you have given them unless both fear that they will not be able to keep [within] the limits of Allah. But if you fear that they will not keep [within] the limits of Allah, then there is no blame upon either of them concerning that by which she ransoms herself. These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers. And if he has divorced her [for the third time], then she is not lawful to him afterward until [after] she marries a husband other than him. And if the latter husband divorces her [or dies], there is no blame upon the woman and her former husband for returning to each other if they think that they can keep [within] the limits of Allah. These are the limits of Allah, which He makes clear to a people who know. And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms, and do not keep them, intending harm, to transgress [against them]. And whoever does that has certainly wronged himself. And do not take the verses of Allah in jest. And remember the favor of Allah upon you and what has been revealed to you of the Book and wisdom by which He instructs you. And fear Allah and know that Allah is Knowing of all things.[29]

Abdul Rehman Kilani established that the practice of observing three *ṭalāq* (divorce pronounced three times) as irrevocable originated during the period of ʿUmar ibn al-Khaṭṭāb, the second Caliph of Islam. According to Kilani's interpretation, this decision was based more on political and social considerations rather than purely on *sharīʿah* principles. During Umar's rule, the Muslim conquests in regions such as Iraq, Persia, and Egypt led to an influx of captured women

[22]Tanzeel-ul-Rehman. *Majmūʿa Qawānīn-i-Islām* [Collection of Laws], 357.

[23]"Dissolution of Muslim Marriage Act, 1939," *The Pakistan Code: Ministry of Law and Justice,* (1939), https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-cJaW-sg-jjjjjjjjjjj (accessed January 28, 2025).

[24]"Dissolution of Muslim Marriage Act, 1939," 3.

[25]"Dissolution of Muslim Marriage Act, 1939," 2.

[26]Yasir Arafat, "The Dissolution of Muslim Marriage Act, 1939 May Provide More Rights to Women of Subcontinent if Applied According to True Doctrine of Maliki School of Islamic Jurisprudence: An Overview," *The Journal of Applied Social Sciences* 1 (2015): 63.

[27]Arafat, "The Dissolution of Muslim Marriage Act, 1939 May Provide More Rights to Women of Subcontinent," 64.

[28]Fazlur Rahman, "Survey of Modernization of Muslim Family Law," *International Journal of Middle East Studies* 11, no. 4 (1980): 459.

[29]Al-Baqarah 02:229-231.

into cities like Medina and Mecca. This abundance of women led many men to take marriage lightly, reviving the pre-Islamic Arab custom of placing women in a state of uncertainty—divorcing and then retracting the divorce repeatedly. In response to the growing number of such cases, Hazrat Umar decreed that if a man pronounced *ṭalāq* three times regardless of whether he was serious or acting in haste—the divorce would take immediate and final effect, without the possibility of retraction, reconciliation, or remarriage. Although intended as a disciplinary measure suited to a specific historical context, this principle gradually became universally accepted as religious doctrine, thereby undermining its original corrective intent.[30]

Although the institution of marriage is generally encouraged by the Qur'ān, Chapter 24 of the Qur'ān also mentions temporary abstinence for people who lack the resources to start a household until their financial or personal circumstances improve.[31] According to traditional Islamic jurisprudence, marriage is a legally binding agreement. Clauses 18 and 19 of the *nikāh nāma* (marriage contract), which are part of Pakistan's Muslim Family Laws Ordinance of 1961, have generated a lot of discussion.[32] Critics contend that rather than adhering to traditional *sharīʿah* values, these phrases reflect contemporary secular and feminist influences. While Clause 19 asks whether the husband's authority to declare *Ṭalāq* has been restricted, Clause 18 permits *Ṭalāq-e-Tafwīḍ*, or the delegation of the right of divorce to the woman. The law does not require the spouse to provide a reason for exercising his fundamental right to *Ṭalāq*, even though conditions may be placed on him.[33]

However, some religious scholars (*Ulama*) are against the idea of delegation of the divorce right to women, stating that it is incompatible with Islamic law. They argue that *Ṭalāq-e-Tafwīḍ* lacks binding legal force and that a man's exclusive authority to pronounce divorce cannot be transferred to a woman through delegation. Nevertheless, many scholars and legal bodies support *Ṭalāq-e-Tafwīḍ* as a valid provision to protect women's rights within marriage. This view draws on the precedent from the Prophet Muhammad (PBUH), who gave his wives a choice in remaining in the marriage, as narrated by Aisha (RA): "The Messenger of Allah granted us the choice, and we chose him; hence it did not amount to a divorce." [34]

However, the Ẓāhirī school of thought takes a different stance, arguing that if the wives had made a different decision, the Prophet, not the wives, would have started the divorce. Additionally, it is widely believed that a woman may only declare one irreversible divorce (*ṭalāq bā'in*) in circumstances of *tamlīk* (delegation). This belief is ascribed to prominent companions such as Ibn ʿAbbās and ʿUmar (may Allah be pleased with them). As an illustration of the long-standing intellectual interest in this complex topic, a man once asked Ibn Masʿūd a query about it:

> There was between me and my wife, the kind of relationship that exists between people (normally). She said (to me), 'Had the power that you possess over me, been in my hands, you would have known how I would treat you.' I said to her, 'In that case, the authority that I possess over you is now in your hands.' She said, 'Then you are divorced thrice' ". Ibn Mas'ad replied, "I consider this to be a single repudiation,

[30]Abdul Rehma Kilani, *Tīn Ṭalāq aur inkā Sharʿī Ḥal* [Three Divorce and its Islamic Solution, Urdu] (Lahore: Dar-ul-Salam, n.d.), 23-25.

[31]Rahman, "Survey of Modernization of Muslim Family Law," 454-455.

[32]"Muslim Family Law Ordinance, 1961."

[33]Hooria Hayat Khan, and Azmeh Khan, "Women's Rights and the Nikah Nama in Pakistan," (2019): 14-15, https://www.cerp.org.pk/wp-content/uploads/2023/06/41_20200504004625.pdf (accessed August 10, 2022).

[34]Ibn Rushd, *The Distinguished Jurist Premier: Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid* [The Beginning of the Mujtahid and the End of the Muqtasid], Trans., Imam Ahsan Khan Nyazee. Vol. II (Garnet Publishing, 2000), 86.

and you have a right over her as long as she is in her idda; I will, however, consult the Amir al-Mu'minin, Umar". He then met "Umar and related the case to him. 'Umar said, "Allah has given men what He did. If they desire to place in the hands of women, what Allah has placed in their authority, then, dust is in their jaws. How did you decide it?" He said, "I held it to be a single repudiation, and that he still has a right over her". 'Umar said, "I hold it to be the same, and if you had decided it differently I would have considered you to be wrong."[35]

Given the aforementioned custom, the Ulāmā believe that women should have the right to divorce in violation of *sharī'ah* norms. If a husband grants his wife this right, she is only permitted to grant herself one divorce and has the right to repudiation. According to Ḥāfiẓ Ṣalāḥuddīn Yusuf (1945–2020), "Islam grants divorce rights to men, not women, and the marriage contract's *Ṭalāq-e-Tafwīḍ* clause is against *sharī'ah* and Islamic teachings."

3.1. Law and Sharīʿah Principles of *Khula*

Another significant Muslim family law in Pakistan that is impacted by secularization is the law of *khula*, or women's right to divorce. Gender equality is the fundamental principle in this contemporary and changing environment. The western-influenced globe is helping to eradicate all forms of gender discrimination since the 1948 Universal Declaration of Human Rights.[36] The history of Pakistan's constitution has also undergone many revisions over the years due to human rights activists.

In Ḥanafī School of thought, if a woman is willing to get *khula* she must seek the consent of her husband and she should then pay compensation amount to him as well, if the idea was originally initiated by her.[37] However, the Mālkī School is slightly more reflexive and modern in their approach to *khula* and gives more rights to woman as compared to Ḥanafī School. Therefore, Imām Mālik and his followers agree on the fact that the decision of authorities chosen by the state, court or the people in relationship themselves for resolving conflict between the spouses can lead to the decision of separation or union and such consequences are valid without any particular delegation by either of them. The behavior of Pakistani courts have been antithetical in their decisions as it takes some time the side of traditional stance and sometime the secular side of the arguments. As it is evident in the cases of *Khurshid Bibi v. Muhammad Amin*, in which the court deviated from traditional Ḥanafī opinion and in the case of Lai Muhammad v. Gull Bibi in which the court upheld the Ḥanafī jurisdiction.[38] "And if you divorce them before you have touched them and you have already specified for them an obligation, then [give] half of what you specified - unless they forego the right or the one in whose hand is the marriage contract foregoes it. And to forego it is nearer to righteousness. And do not forget graciousness between you. Indeed Allah, of whatever you do, is Seeing."[39] "And due to the wives is similar to what is expected of them,

[35]Ibn Rushd, *The Distinguished Jurist Premier: Bidāyat al-Mujtahid wa Nihāyat al-Muqtaṣid,* 86.

[36]See Article 16 of Declaration of Human Rights, "The Universal Declaration of Human Rights," *United Nations.* 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed January 28, 2025).

[37]Rubya Mehdi, *The Islamization of the Law in Pakistan,* Nordic Institute of Asian Studies Monograph Series (Richmond: Curzon Press, 1994), 177.

[38]To see the full detail of court decisions in this regard please see: Mehdi, *The Islamization of the Law in Pakistan,* 177-184.

[39]Al-Baqarah 2:237.

according to what is reasonable. But the men have a degree over them [in responsibility and authority]. And Allah is Exalted in Might and Wise."[40]

The reformists, on the other hand, contended that any reliable interpretation (such as that of Mufti Muhammad Shafī', the author of *Maʿārif al-Qur'ān*) would demonstrate that this verse explains why a husband who fulfills his obligations, particularly his financial obligations—deserves his wife's obedience and respect. Additionally, the orthodox Ulama maintained that in order to violate the marital contract, the husband's approval is required. Without her husband's approval, a woman cannot receive *khula*. On the contrary, reformists also refute this claim using *Sunnah* precedent, citing Thabit b. Qays's wife as an example. According to *Ṣaḥīḥ al-Bukhārī*: "The wife of Thabit bin Qais came to the Prophet and said, "O Allah's Apostle! I do not blame Thabit for defects in his character or his religion, but I, being a Muslim, dislike behaving in un-Islamic manner (if I remain with him)." On that Allah's Apostle said (to her), "Will you give back the garden which your husband has given you (as *Mahr*)?" She said, "Yes." Then the Prophet said to Thabit, "O Thabit! Accept your garden, and divorce her once."[41]

Reformists also contend that patriarchy was the main characteristic of cultures in earlier times, which were mostly male-centered. Therefore, Muslim jurists' asserted that early legal views were more in the favor of men as compared to women. There was a wider acceptance for it in those times. However, society today is changing into a new dynamic era where discrimination based on gender is frowned upon.

3.2. Iddat Rulings

3.3.1. Difference between Void (*batil*) and Irregular (*fāsid*) Marriage

While elaborating the difference between *bāṭil* and *fāsid* marriage court took the help from D.F. Mullah's Principles of Muhammadan Law. It states: "A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity, affinity, or fosterage, is void the prohibition against marriage with such a woman being perpetual and absolute. An irregular marriage is one which is not unlawful in itself, but unlawful "for something else", as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses."[42]

After differentiating between *bāṭil* (void) and *fāsid* (irregular) marriages,[43] the honorable judge stated, "I am not inclined to accept this contention," even though Asaf Ali Asghar Fyzee, an Indian jurist, scholar, diplomat, and a pioneer in modern Ismaili studies—identified five types of irregular marriages in his writings, one of which includes marriage during the period of *iddah*.[44]

However, Fyzee's view appears to conflict with clear Qur'ānic interpretation, which explicitly prohibit divorced or widowed women from remarrying until they have completed their defined waiting period (*iddah*). The court's decision in this context seems to reflect secular principles of

[40]Al-Baqarah 2:228.

[41]Jessica Carlisle, *Muslim Divorce in the Middle East: Contesting Gender in the Contemporary Courts* (Palgrave Pivot, 2019).

[42]Carlisle, *Muslim Divorce in the Middle East*, 4-5.

[43]N. J. Coulson, "Reform of Family Law in Pakistan," *Studia Islamica* 7 (1957): 143.

[44]Carlisle, *Muslim Divorce in the Middle East,* 6.

gender equality—arguing that if a man is permitted to remarry immediately after divorcing his wife, a woman should be afforded the same right. Yet, this notion of equality contradicts the teachings of the Qur'ān and Islamic Sharīʿah, which mandate that a woman must observe the *iddah* period before entering into a new marriage. Later jurisdiction adopted this concept and ruled that such a marriage where a divorced or widowed woman entered without the waiting period of *iddat* is considered irregular but not void.[45]

3.3.2. *Iddat* and the Right to Remarry

In Islamic Sharīʿah, *iddat* is the period for divorced or widowed women to wait before they can marry another person.[46] The most widely accepted definition of *iddat* is, the time period after which marrying again for the divorced or widowed women is considered lawful.[47] The Qur'ān proclaimed in this regard that "Divorced women remain in waiting for three periods, and it is not lawful for them to conceal what Allah has created in their wombs if they believe in Allah and the Last Day."[48]

The time period specified is different for divorced and widowed women. While divorced women have an *Iddat* of three months, it is of four month and ten days for the widows. "And those who are taken in death among you and leave wives behind - they, [the wives, shall] wait four months and ten [days]. And when they have fulfilled their term, then there is no blame upon you for what they do with themselves in an acceptable manner. And Allah is [fully] acquainted with what you do."[49]

While these verses clearly state the mandatory waiting period before the divorced and widowed women can marry again, the question that whether the marriage will be valid or not if they marry within this time period, still remains. Ibn Qudamah al-Maqdissi (1147-1223) [of Hanbali jurisdiction], stated in this regard: "If a women who is observing *iddah* gets married and they were aware of the *iddah* and the prohibition on marrying during this period, and he had intercourse with her, then they are *zaanis*; the *ḥadd* punishment for *zinā* should be carried out on them, she is not entitled to any *mahr* and any child born should not be attributed to him. But if they were unaware of the *iddah* or of the prohibition, then the child is to be attributed to him, the *ḥadd* punishment is waived and the *mahr* must be paid."[50]

On the other hand, contrary to traditional jurist view and *sharī'ah*, the Lahore High Court given the verdict on December 24, 2021 that such a marriage (although irregular) is neither void nor do it fall under the offence of *Zinā* as defined under section 4 and punishable under section 5 of Offence of *Zinā* (Enforcement of *Ḥudūd*) Ordinance, 1979.[51]

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[45]Wajih Ahmad Sheikh, "Lahore High Court Rules Marriage without completing Iddat not Void," *Dawn.com*, January 8, 2022, https://www.dawn.com/news/1668239; "Judgment Sheet in the Lahore High Court Multan Bench, Multan Judicial Department," (Lahore, 2021).

[46]Javed Ahmad Ghamadi, *Al-Mīzān* (Lahore: Almoord Idara Ilm o Tehqeeq, 1990), 412-413.

[47]Burhan-ul-Din al-Marghinani, *The Hidaya or Guide: A Commentory on the Musalman Law,* trans., Charles Hamilton Vol. 1 (Cambridge University Press, 2013), 359.

[48]Al-Baqarah 2:228.

[49]Al-Baqarah 2:234.

[50]Ibn Qudamah Al-Maqdisi, *al-Mughni,* VIII. Vol. 8 (Dar 'Alam al Kutub, 1223 [2013]), 103.

[51]"Judgment Sheet in the Lahore High Court Multan Bench, Multan Judicial Department," (Lahore, 2021); also see Sheikh, "Lahore High Court Rules Marriage without completing Iddat not Void," https://www.dawn.com/news/1668239

3.3. Polygamy

Qur'ānic verses on the subject of Polygamy have been interpreted in several ways by various scholars, under various schools of thought, thus making it a very controversial subject particularly in the region of Pakistan. The favoring factors like Prophet Muhammad (PBUH) being married to multiple women, and the opinions against it have always made it a subject of argument among scholars. As Qur'ān narrated: "If you fear you might fail to give orphan women their ˹due˺ rights ˹if you were to marry them˺, then marry other women of your choice—two, three, or four. But if you are afraid you will fail to maintain justice, then ˹content yourselves with˺ one or those ˹bondwomen˺ in your possession. This way you are less likely to commit injustice."[52]

In another verse Qur'ān states: "And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]. So do not incline completely [toward one] and leave another hanging. And if you amend [your affairs] and fear Allah - then indeed, Allah is ever Forgiving and Merciful."[53]

Based on these verses, the modern jurisdiction claimed that although the Qur'ān permits polygamy, it only permits it for the protection of widows and orphans following wartime; and for equal treatment of wives, which is impossible for a man given the understanding of the aforementioned verse from the Holy Scripture. Despite logical understanding of the text, the religious lobbies resist arguing that the modernist Ulamā (under the influence by secular ideologies), have sought to impose restrictions on polygamy– a practice permitted by Islam and Sharīʿah. The Muslim Family Laws Ordinance (MFLO) 1961 emerged as a negotiated compromise between traditional religious scholars and secular-minded reformists.[54]

However, the ideological tension between these two groups has remained unresolved on the subject of polygamy. Niaz A. Shah from orthodox lobbies, notes, "The Islamic nature of the MFLO has always been questionable. The ordinance attempts to offer a kind of balance between Islamic principles and secular requirements and tendencies." A clear example of this unresolved compromise is the regulation of second marriages. While Section 6 of the MFLO renders a second marriage without prior permission illegal under the law, such a marriage is still considered valid under *Sharīʿah* principles. Such disagreements similarly extend to other discourses as well, including divorce procedures and marriage registration requirements.[55] On the other hand, judiciary and human rights activists upholds the view that, "…obtaining permission from the first wife for contracting second marriage, is not against injunctions of Islam. It further observed that the Qur'ānic verse which permits polygamy itself, prescribes the precondition of '*adl* (justice or just treatment) along with emphasis on the difficulty of fulfilment of this condition."[56]

4. Comparative Analysis of Traditional Fiqh and Modern-State Legislation

Modern Legislative structure supports reforms in family laws which are frequently and rigorously resisted by orthodox religious groups in Pakistan. This tension stems from the inherent believe that traditional *fiqh* is ordained by Divine order which is being replaced by state-led modern and

[52]An-Nisa 4:3.
[53]An-Nisa 4:129.
[54]"Muslim Family Law Ordinance, 1961."
[55]Mehdi, *The Islamization of the Law in Pakistan,* 189.
[56]Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 213.

secular reforms.[57] Few orthodox scholars, Islamic political parties, and traditionalist groups opposed this legislative intervention as unIslamic– making it impossible to implement these reforms. Before discussing the logical reason for this tension, let us briefly compare and analyze the arguments of both groups (for and against) reforms in Pakistani family laws.

Table 1. Comparing arguments of Resistance for Reforms in Family Laws among Traditionalists & Modernists

Traditionalists	Modernists
Patriarchal mindset where only man has right to divorce– so judicial expansion of khula is criticized for allowing women the right to divorce without husband's consent.	Women have right to seek judicial divorce or *khula* to get protection from abusive and toxic marriage.[58]
Iddat is mandatory (for divorced or widower women),[59] while any *nikāh* in this period would attribute to *zina* and becomes void.	*Nikāh* would be irregular but not void if *Iddat* period has not been observed (for divorced or widowed women).[60] Furthermore, it won't be attributed as *zina.*
The law that 'Registration of marriage and divorce is mandatory' is seen as state intrusion into religious practice.	Registration of marriage and divorce is mandatory because various cases raised concerns where man married a woman and later refuse to acknowledge it. Registration of marriage provides protection to women against such scenarios.[61] It also protects the couple from accusations of zina by other family members.[62]
Restrictions on polygamy and regulation of *Talāq* is seen as unIslamic	Polygamy is allowed with condition where seeking permission of the first wife becomes mandatory.[63] Moreover, it is not anti-Islamic as Qur'ān taught husbands to maintain justice among all his wives failing to do so legitimize court intervention.[64]
Secular laws are the reason for increased divorce rate in Pakistan.[65] They blame women	Divorce are getting common for multiple reasons involving both spouses– blaming

[57]Abbasi, and Cheema, "Historical Context of Muslim Family Law in Pakistan," 17.

[58]For detailed legal grounds see, "Dissolution of Muslim Marriage Act, 1939," *The Pakistan Code: Ministry of Law and Justice,* (1939), 2-4, https://pakistancode.gov.pk/english/UY2FqaJw1-apaUY2Fqa-cJaW-sg-jjjjjjjjjjjj (accessed January 28, 2025).

[59]Mohammad Ibrahim Sarhan, "Rulings on Iddah in Islamic Sharia: A Jurisprudential Study," *Migration Letters*, (2023): 698-707.

[60]Sheikh, "Lahore High Court Rules Marriage without completing Iddat not Void."

[61]Ahmad, "The Muslim Family Law Ordinance of Pakistan," 41.

[62]Zaman, "Exchange Marriage System and Muslim Family Laws in Pakistan," 5-7.

[63]"Muslim Family Law Ordinance, 1961."

[64]Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 213-217.

[65]*Views on Divorce Rate in Pakistan; 48% Believe it Has increased, of Whom Majority Believes it is Due to Lack of Patience* (Prod. Gilani Research Foundation. Islamabad, June 02, 2010).

Traditionalists	Modernists
on the grounds of: lack of patience, western influence.[66]	women alone, proves the patriarchal mindset behind traditional religious parties resistance.[67]
A woman cannot contract marriage without *wali* (father or legal guardian)	A woman can contract marriage without the consent of *wali* (father or legal guardian)[68]
Man is the financial provider and he have a degree above woman	Indeed, but owing to financial needs and increased inflation, both spouses are compelled to work. Neither of them can misuse financial provision as a license to abuse each other.

It must be noted here that this resistance to reform is not merely theological in nature, but also socio-cultural. Patriarchal family structures prevailing in South-Asia is threatened by women-centric reforms. Moreover, there is an underlying fear of erosion of traditional authority within the family where man is considered as the head of family. Reforms are seen as foreign to local and cultural norms. Hence, due to this intertwining of religion, culture and power amplifies the resistance to legal change. In contrast, critics argued that major portion of resistance relies heavily on selective readings of Islamic sources. Classical fiqh is diverse (with four school of thoughts); and itself can evolve through *ijtihad* and contextual comprehension of Scriptures.[69] Furthermore, justices (*adl*), public welfare (*maslahah*) are core Islamic principles supporting reform. Opposition sometimes reflects patriarchal interest instead of purely religious fidelity.

Laws are made to ensure the protection of the vulnerable (in family laws case: its women) from abuse and injustice.[70] These reforms are in fact grounded in Islamic jurisprudence where contextual *ijtihad* allows evolving without abandoning Sharīʿah.[71] Reconsider the section 3.4.where Khurshid Nadeem asserted that women demand to be granted the right to *khula* on an equal footing with men.[72] In here, one must comprehend the point as to why women need *Khula*? It is not because women are demanding equality but because they are suffering in toxic and abusive marriages. There are men who do not financially provide nor protects their wives rights; men marrying twice and thrice leaving their first wives to fend for themselves but refuse to free them of marriage contract or abusive marriage etc. In such cases, Pakistani courts intervene to protect

[66] *Views on Divorce Rate in Pakistan; 48% Believe it Has increased, of Whom Majority Believes it is Due to Lack of Patience.*

[67] Other reasons includes exchange marriages (*watta satta*), underage marriages against child laws. See Zaman, "Exchange Marriage System and Muslim Family Laws in Pakistan," 12.

[68] Sabreen, "The Judiciary-led Islamization of Family Law in Pakistan," 214, In this regard, consider following verse: "O believers! It is not permissible for you to inherit women against their will or mistreat them to make them return some of the dowry ʿas a ransom for divorceʾ—unless they are found guilty of adultery. Treat them fairly. If you happen to dislike them, you may hate something which Allah turns into a great blessing." An-Nisa 4:19.

[69] Coulson, "Reform of Family Law in Pakistan," 144.

[70] Ahmad, "The Muslim Family Law Ordinance of Pakistan," 44.

[71] Coulson, "Reform of Family Law in Pakistan," 144.

[72] Khursheed Nadeem, "Khula aur Tanseekh Nikah," [Khula and Cancelation of Nikah, Urdu] *Dunya News,* February 2, 2015.

women.[73] Furthermore, protecting women rights is neither purely secular nor against Islam as some orthodox religious groups claims. Islam commands men to either fulfill their conjugal duties as ordained by Allah or leave them with grace instead of binding them unethically.[74] The following verse proves that a woman can seek separation on grounds other than impotency (contrary to Hanafi school of thought: "If a woman fears indifference or neglect from her husband, there is no blame on either of them if they seek ˹fair˺ settlement, which is best. Humans are ever inclined to selfishness. But if you are gracious and mindful ˹of Allah˺, surely Allah is All-Aware 'of what you do."[75]

Likewise, on domestic abuse, laypersons selectively read passages of Qur'ān and Hadīth without understanding that Islam only allows gentle firmness (one that does not inflict damage to her body and mind) if the women is adulterous: "Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with. And if you sense ill-conduct from your women, advise them ˹first˺, ˹if they persist,˺ do not share their beds, ˹but if they still persist,˺ then discipline them ˹gently˺. But if they change their ways, do not be unjust to them. Surely Allah is Most High, All-Great."[76]

On another occasion, Qur'ān proclaims that: "O believers! It is not permissible for you to inherit women against their will or mistreat them to make them return some of the dowry ˹as a ransom for divorce˺—unless they are found guilty of adultery. Treat them fairly. If you happen to dislike them, you may hate something which Allah turns into a great blessing. If you desire to replace a wife with another and you have given the former ˹even˺ a stack of gold ˹as a dowry˺, do not take any of it back. Would you ˹still˺ take it unjustly and very sinfully?[77]

Our patriarchal mindset has misused the aforementioned verse in order to favor domestic violence and to maintain that it is permissible.[78] Women who exercised their rights are often socially stigmatized, physically and mentally abused and encountered family estrangement.[79] There are innumerable cases reported for domestic violence even for minute errors[80]— like serving cold food; flatbread for not being round; and not being able to conceive sons etc. The same religious lobby, on the other hand, remain silent on the issues of dowry, joint-family structures etc. which too are unIslamic. They also fail to acknowledge the harmful impact of domestic violence on children making them suffer from lifelong trauma, poverty and social exclusion, educational disruption; and an increased risk of perpetrating harm or experiencing violence.[81] So relying on Islam for personal patriarchal gratification and establishment of authority have less to do with religion and more to do with power.

[73]"Dissolution of Muslim Marriage Act, 1939."
[74]"Judgment Sheet in the Lahore High Court Multan Bench, Multan Judicial Department."
[75]An-Nisa 4:128.
[76]An-Nisa 4:34.
[77]An-Nisa 4: 19-20.
[78]Khadija Ali, and Meerum Inam, *Domestic Violence: Policy Brief* (Policy Brief, National Commission for Human Rights, Pakistan, Government of Pakistan, 2023), 9.
[79]Filomena M. Critelli, "Between Law and Custom: Women, Family Law and Marriage in Pakistan," *Journal of Comparative Family Studies* 43, no. 5 (2012).
[80]Ali, and Meerum Inam, *Domestic Violence: Policy Brief.*
[81]Ali, and Meerum Inam, *Domestic Violence: Policy Brief,* 12.

On the other hand, the very argument of religious groups claiming that modern-state legislations are secular is objectionable and easily refutable. 1) Universal Declaration of Human Rights is itself derived from multiple religious principles. 2) Article 16 of UDHR, 1948 states that: "family is natural and fundamental group unit of society; and is entitled to protection by society and the State. And all individuals are entitled to equal rights in marriage and at its dissolution. And that one should entered into marital union with free will and consent.[82]

These points are mentioned and ordained by Islam much before this declaration, so how can they be secular? It is self-evident that patriarchal mindset need to be upgraded not only for the betterment of the family institution but also for the better future of Pakistan.

5. Conclusion and Way Forward

The development in Muslim family laws, particularly in the context of Pakistan, reflects a continued negotiation needed between deeply rooted Islamic traditions and the demands of modern legal and social system. Subjects like marriage, divorce, *khula*, and polygamy have remained a crucial discourse over time with renewed challenges. Traditional jurists, who are mostly based on the Ḥanafī school of thought, have interpreted limited women's legal agency in matters like divorce and the right to demand *khula*. Reforms such as *Ṭalāq-e-Tafwīḍ*, court-granted divorces, and conditional polygamy have been regarded by traditional scholars as deviations influenced by secular and feminist ideologies originating from western non-Muslim world. Yet, these reforms often draw upon the more flexible interpretations of other schools of thought like the Mālikī, which have long been recognized to have more flexible grounds for women's rights within marriage.

Modern legal reforms, particularly the Muslim Family Laws Ordinance (MFLO) 1961, have attempted to balance Islamic teachings with the dynamic realities of a modern Muslim society. While the Ordinance introduced progressive measures, such as the registration of marriage and divorce, restriction on polygamy without consent of the first wife, and recognition of women's right to divorce, it remains debatable among traditional scholars. The case of three *ṭalāq* being made irrevocable under Caliph ʿUmar's decree, or the legality of second marriages under certain conditions, under Section 6 of the MFLO, demonstrate that many legal reforms were contextual responses to social challenges. This illustrates the adaptability of Islamic law in historical settings, while also underscoring the need for continued scholarly engagement to separate historical practices from undisputable principles. On the contrary, opposition of religious groups to modern reforms in family laws of Pakistan reveals a deeper patriarchal threat over authority, interpretation and identity. However, a sustainable legal reform requires dialogue between religious scholarship and modern legal reasoning rather than their mutual exclusion.

From an Islamic perspective, it is crucial that any reform efforts maintain fidelity to the core values of Sharīʿah, especially justice (*adl*), compassion *(raḥmah*), and public welfare *(maṣlaḥah*). Reforms must not be oppositional to Islam but could rather be interpretations intended to better reflect the objectives of the Sharīʿah principles in contemporary contexts.[83] This calls for a more inclusive approach to Islamic legal thought, one that draws upon the diversity within traditional jurisprudence and acknowledges the legitimate concerns of both traditionalists and modernists,

[82]"The Universal Declaration of Human Rights," *United Nations,* (1948), https://www.un.org/en/about-us/universal-declaration-of-human-rights (accessed January 28, 2025).

[83]Ahmad, "Ulamā' and the Muslim Family Laws in Pakistan," 77.

while keeping an optimum balance among both. Instead of seeing tradition and reform as binaries, there is a need to develop jurisprudential methods that bridge the two, ensuring both Sharī'ah authenticity and modern relevance.

The current study discussed in details as to why reforms in family laws of Pakistan are needed owing to new challenges in an ever-evolving society. It has also analyzed that judicial *ijtihad* is not anti-Islamic and secular; rather judicial interpretations aims to protect vulnerable (women and children) from injustice and abuse. Lastly, the paper also highlighted points that shows that the reluctance to accept family reforms in Pakistan is due to the fact that male-dominated society feel threatened by women-centric rights as it diminishes their patriarchal and authoritative exercise of power. They seek refuge in selective verses of the Qur'ān and Hadīth while neglecting other commands of Qur'ān; and their conjugal duties. Nonetheless, the tension between the fundamentalist (or orthodox) *Ulama's* and modern scholars would continue to oppose each other until the biasedness of patriarchy extinguishes.[84]

Future researchers are encouraged to contribute to this evolving debate by conducting interdisciplinary studies, including cross comparison of multiple schools of thought in Islamic *Sharī'ah,* that combine classical Islamic legal texts with legal texts, with empirical analyses of how these laws function in contemporary societies. Case studies such as the lived experiences of women under current family laws; comparative studies of reforms in other Muslim-majority countries; and the influence of judicial *ijtihad* on legal consciousness can provide valuable insights in this regard.

The reforms in family laws of Pakistan demonstrate that these reforms are not inherently contradictory with Islamic teachings. But resistances from religious groups have privileged and favored conservative readings, thereby constraining interpretive flexibility and judicial *ijtihād*. In order to regulate sustainable reforms, legal change should not be opposed under the name of religious fidelity. Only Critical thinking and ethical evaluation can deepen the horizon of how Islamic family laws can be faithful to its religious foundations and responsive to modern-day challenges. By reconciling Islamic principles with modern legal realities, Pakistan can ultimately leads it nation to a more just and compassionate legal framework for all members of society.

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[84]Coulson, "Reform of Family Law in Pakistan," 155.

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